

Moreover, the evidence established the period of repetitive traumas to claimant's knees began in 1996 when he commenced working for respondent a second time.

Consequently, the Board held claimant's preexisting functional impairment should be measured as of 1996 for purposes of determining claimant's award.¹

In short, the Board held in its June 30, 2003 Order that claimant sustained a 45 percent functional impairment to the right lower extremity and a 17.5 percent functional impairment to the left lower extremity as a result of the repetitive micro-traumas claimant sustained while working for respondent through July 31, 2002. The Board also held claimant sustained a 24 percent whole body functional impairment, with eight percent preexisting due to an earlier right knee injury.² Hence, the Board awarded claimant permanent partial general disability benefits for a 16 percent whole body functional impairment.

Respondent and its insurance carrier (respondent) appealed the Board's June 30, 2003 Order to the Kansas Court of Appeals. By its March 12, 2004 decision, the Kansas Court of Appeals vacated the Board's June 30, 2003 Order and remanded this claim to the Board with directions to determine claimant's preexisting functional impairment as of May 31, 2000. The Court's decision reads, in part:

The Board's Order is vacated, and the matter is remanded to the Board with instructions to determine an award to claimant after appropriate offset for preexisting impairment using May 31, 2000, as the date for measurement of same.

Consequently, the only issue before the Board on this remand is the extent of claimant's preexisting functional impairment using May 31, 2000, as the measuring date.

Claimant contends respondent has failed to prove that he had any preexisting impairment in either knee before May 31, 2000, as he performed his duties as a drywall finisher through that date and the record is void of any evidence that his activities were impaired before that date. Accordingly, claimant requests the Board award him permanent disability benefits for a 24 percent whole body functional impairment.

Conversely, respondent relies upon Dr. Roger Hood's testimony and argues that all of the impairment in claimant's left knee and left leg preexisted the May 31, 2000 accident. Moreover, respondent argues all of the impairment in claimant's right knee preexisted the May 2000 incident, except for two percent.

¹ See K.S.A. 44-501(c).

² The Board found claimant sustained a prior 21 percent functional impairment to the right lower extremity (which converts to an approximate eight percent whole body functional impairment) as the result of a 1988 right knee injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured his knees while working for respondent as a drywall finisher. As indicated above, claimant sustained repetitive micro-traumas to his knees while performing those job duties through July 31, 2002, which was the day before claimant's regular hearing. Consequently, that date is designated the appropriate date to compute claimant's permanent disability benefits for claimant's period of accidental injury.

The Kansas Court of Appeals has determined that May 31, 2000, is the appropriate date to determine claimant's preexisting functional impairment for purposes of reducing any award of disability benefits under K.S.A. 44-501(c).

A brief summary of the facts is helpful. On May 31, 2000, claimant was working on stilts and slipped in drywall mud. Shortly afterwards his right knee began swelling and within two or three weeks of the slipping incident claimant began having significant symptoms in his left knee. Although claimant acknowledged previous right knee problems, including an arthroscopic procedure, he initially denied having experienced previous problems with his left knee before the May 2000 incident.³ Claimant, however, later testified he had intermittently experienced left knee symptoms before the May 2000 incident.⁴

After the May 2000 incident, claimant continued to work full-time until he left work in October 2000 for a total right knee replacement. During the period between the May 2000 accident and the October 2000 right knee replacement, claimant noticed his left knee was getting weaker and that it had begun to ache, swell, pop, and give way. Claimant specifically denied that his left knee gave way or popped before that time.

The record contains the opinions from two medical experts. Dr. Roger Hood, the orthopedic surgeon who performed claimant's right knee replacement, testified claimant's work injury significantly aggravated and accelerated the preexisting arthritis in his right knee. Knowing that claimant's right knee was bone on bone and that claimant had worn away approximately $\frac{3}{8}$ inch of tibia before the slipping incident, Dr. Hood estimated

³ P.H. Trans. at 10.

⁴ Hahn Depo. at 24.

claimant had a 65 or 70 percent functional impairment to the right lower extremity immediately before the May 31, 2000 accident.⁵

Dr. Hood, however, also testified that claimant now has a 40 percent functional impairment to the right leg under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides), with two percent attributable to the subject accident at work.⁶

Dr. Hood never examined claimant's left knee. But based upon information from claimant's medical records, the doctor opined claimant only temporarily aggravated the arthritis in his left knee.⁷ The doctor, however, did conclude claimant had a preexisting impairment in his left leg before the May 2000 incident anywhere from five percent (based upon the records and findings made in July 2000 by Dr. Peter Vilkins) to 10 or 15 percent (based upon Dr. Truett Swaim's x-ray readings and findings).

At claimant's attorney's request, orthopedic surgeon Dr. Truett Swaim examined claimant. Dr. Swaim, who examined claimant in July 2001, diagnosed claimant with a total right knee replacement and arthritis in the left knee. Using the AMA Guides, the doctor rated claimant as having a 50 percent functional impairment in the right lower extremity. The doctor also concluded claimant had a two percent functional impairment in that leg before the May 2000 accident due to a 1988 injury and a partial meniscectomy.⁸ But the doctor also testified claimant's x-rays indicated he would have had a 50 percent functional impairment rating to the right leg before the May 2000 accident.⁹

Dr. Swaim also rated claimant's left knee under the Guides. The doctor concluded claimant had a 20 to 25 percent functional impairment to the left leg due to narrowing in the medial joint space.¹⁰ Although x-rays would indicate claimant had a 20 percent impairment to the left knee before the accident, Dr. Swaim did not find any treatment records regarding the left knee before the May 2000 incident and claimant, contrary to what is contained in Dr. Vilkins' medical records, denied really having any left knee problems

⁵ Hood Depo. at 26-27.

⁶ *Id.* at 30.

⁷ *Id.* at 16.

⁸ Swaim Depo. at 21.

⁹ *Id.* at 58-60.

¹⁰ *Id.* at 25.

before the May 2000 accident. Consequently, Dr. Swaim testified he did not have any information to quantify the left knee impairment before May 2000.

In its June 30, 2003 Order, the Board averaged the functional impairment ratings provided by Dr. Hood and Dr. Swaim and found claimant sustained a 45 percent functional impairment to his right leg and a 17.5 percent functional impairment to his left leg due to his repetitive bilateral knee injuries. Moreover, the Board held claimant's 1988 right knee injury created a 21 percent functional impairment to his right leg.

The Board now concludes the evidence establishes that claimant sustained a two percent functional impairment to the right leg due to the May 2000 accident and subsequent work he performed for respondent through July 31, 2002. The Board also concludes that claimant sustained additional permanent injury to the left knee as a result of the May 2000 accident and subsequent work that he performed for respondent through July 31, 2002, but the record fails to establish that the *AMA Guides* would rate that additional injury any higher than what existed immediately before the May 31, 2000 accident.

Utilizing the *AMA Guides* to convert the two percent right leg functional impairment to a whole body impairment yields a one percent whole body functional impairment.¹¹ Accordingly, the Board's June 30, 2003 Order should be modified to award claimant a one percent permanent partial general disability.

The Board adopts the findings and conclusions set forth in its June 30, 2003 Order to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies its June 30, 2003 Order and awards claimant a one percent permanent partial general disability.

Walter Samuel Hahn is granted compensation from Midwest Drywall Co., Inc., and its insurance carrier for a July 31, 2002 accident and resulting disability. Mr. Hahn is entitled to receive 10 weeks of temporary total disability benefits at \$432 per week, or \$4,320, plus 4.15 weeks of permanent partial general disability benefits at \$432 per week, or \$1,792.80, for a one percent permanent partial general disability and a total award of \$6,112.80, which is all due and owing less any amounts previously paid.

¹¹ Multiplying a lower extremity impairment by .4 yields the whole person impairment percentage.

The Board adopts its orders set forth in its June 30, 2003 Order to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director